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Interim Class Counsel

**UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA**

In re Trader Joe's Tuna Litigation

Case No. 2:16-cv-01371-ODW-AJW

**SUPPLEMENTAL BRIEF
IDENTIFYING *CY PRES*
RECIPIENT IN FURTHER
SUPPORT OF RENEWED MOTION
FOR PRELIMINARY APPROVAL
OF CLASS ACTION SETTLEMENT**

Date: October 28, 2019
Time: 1:30 p.m.
Courtroom: 5D, 5th Floor
Judge: Hon. Otis D. Wright II

1 In a September 12, 2019 Minute Order, the Court noted that “[t]he Settlement
 2 Agreement and the Renewed Motion [for Preliminary Approval of Class Action
 3 Settlement] do not identify a proposed charity or provide for the Court’s approval of
 4 the *cy pres* distribution.” Dkt. 100. As such, “the parties [were] Ordered to meet and
 5 confer” and “file a Supplemental Brief identifying the proposed charity or charities
 6 and addressing the legal standards governing *cy pres* distributions.” *Id.* (emphasis
 7 omitted). For the reasons set forth below, the parties have selected Feeding America
 8 as their proposed *cy pres* recipient, which is a nationwide network of 200 food banks
 9 that provides food to more than 46 million people through 60,000 food pantries and
 10 meal programs in communities across America. Fisher Decl. ¶ 2.

11 The Settlement Agreement provides that checks that “are not cleared within one
 12 hundred eighty (180) days” shall “be donated to a charity agreed upon by Class
 13 Counsel, Defendants counsel, and the Settlement Administrator:”

14 Cash Benefit – Uncleared Checks. Those Settlement Class
 15 Members whose cash benefit checks are not cleared within
 16 one hundred eighty (180) days after issuance shall be
 17 ineligible to receive a cash settlement benefit, and Trader
 18 Joe’s shall have no further obligation to make any payment
 19 pursuant to this Settlement Agreement or otherwise to such
 20 Settlement Class Members. All unpaid funds from
 21 uncleared checks shall be donated to a charity agreed upon
 22 by Class Counsel, Defendants’ Counsel, and the Settlement
 23 Administrator.

24 7/23/19 Fisher Decl., Ex. 1, ¶ 2.7 (Dkt. 99-2).

25 The Ninth Circuit has recognized that “[i]n the context of class action
 26 settlements, a court may employ the *cy pres* doctrine to ‘put the unclaimed fund to its
 27 next best compensation use, e.g., for the aggregate, indirect, prospective benefit of the
 28 class.’” *Nachshin v. AOL, LLC*, 663 F.3d 1034, 1038 (9th Cir. 2011) (quoting
Masters v. Wilhelmina Model Agency, Inc., 473 F.3d 423, 436 (2d Cir. 2007); 2
Herbert B. Newberg & Alba Conte, Newberg on Class Actions § 10:17 (4th ed.

1 2002)). *Cy pres* distributions that are part of a class action settlement require court
2 approval, where they are subject to a standard of review for abuse of discretion. See
3 *Nachshin*, 663 F.3d at 1038; *see also Dennis v. Kellogg Co.*, 697 F.3d 858, 861 (9th
4 Cir. 2012).

5 However, the Ninth Circuit cautions that “the *cy pres* doctrine – unbridled by a
6 driving nexus between the plaintiff class and the *cy pres* beneficiaries – poses many
7 nascent dangers to the fairness of the distribution process,” which may occur when
8 some courts “abandon[] the ‘next best use’ principle implicit in the *cy pres* doctrine”
9 and “award[] *cy pres* distributions to myriad charities, though no doubt pursuing
10 virtuous goals, [that] have little or nothing to do with the purposes of the underlying
11 lawsuit or the class of plaintiffs involved.” *Nachshin*, 663 F.3d at 1038-39 (citing *In*
12 *re Motorsports Merch. Antitrust Litig.*, 160 F.Supp.2d 1392, 1396-99 (N.D. Ga. 2001)
13 (distributing \$1.85 million remaining from a price fixing class action settlement
14 relating to merchandise sold at professional stock car races to ten organizations
15 including the Duke Children’s Hospital and Health Center, the Make-a-Wish
16 Foundation, the American Red Cross, and the Susan G. Komen Breast Cancer
17 Foundation); *Superior Beverage Co., Inc. v. Owens-Illinois, Inc.*, 827 F. Supp. 477,
18 480 (N.D. Ill. 1993) (awarding \$2 million from an antitrust class action settlement to
19 fifteen applicants, including the San Jose Museum of Art, the American Jewish
20 Congress, a public television station, and the Roger Baldwin Foundation of the
21 American Civil Liberties Union of Illinois)). The resulting harm is twofold. “When
22 [the] selection of *cy pres* beneficiaries is not tethered to the nature of the lawsuit and
23 the interests of the silent class members, the selection process may answer to the
24 whims and self interests of the parties, their counsel, or the court,” and “the specter of
25 judges and outside entities dealing in the distribution and solicitation of settlement
26 money may create the appearance of impropriety.” *Nachshin*, 663 F.3d at 1039.

Proper *cy pres* distributions “must be guided by (1) the objectives of the underlying statute(s) and (2) the interests of the silent class members.” *Id.* at 1039 (citing *Six (6) Mexican Workers v. Arizona Citrus Growers*, 904 F.2d 1301, 1307 (9th Cir. 1990)). Stated otherwise, “[c]*y pres* distributions must account for the nature of the plaintiffs’ lawsuit, the objectives of the underlying statutes, and the interests of the silent class members, including their geographic diversity.” *Id.* at 1036; *see also* *Dennis*, 697 F.3d at 865 (noting there must be “a driving nexus between the plaintiff class and the *cy pres* beneficiaries”). That said, the Ninth Circuit does “not require as part of that doctrine that settling parties select a *cy pres* recipient that the court or class members would find ideal” – as “such an intrusion into the private parties’ negotiations would be improper and disruptive to the settlement process” – but rather “a *cy pres* remedy must be the ‘next best distribution’ of settlement funds means only that a district court should not approve a *cy pres* distribution unless it bears a substantial nexus to the interests of the class members.” *Lane v. Facebook, Inc.*, 696 F.3d 811, 821 (9th Cir. 2012) (underlining added). For example, in *Lane*, a class action concerning online privacy, the Ninth Circuit held that *cy pres* funds were proper when used to “set up a new charity” to “fund and sponsor programs designed to educate users, regulators, and enterprises regarding critical issues relating to protection of identity and personal information.” *Id.* at 817, 822 (“[T]hat mission statement provides the requisite nexus between the *cy pres* remedy and the interests furthered by the plaintiffs’ lawsuit consistent with the principles we announced in *Nachshin*.”).

Here, the parties have selected Feeding America as their proposed *cy pres* beneficiary. The third-party watchdog website Charity Navigator gives Feeding America high marks (i.e., a score of 94.28 out of 100), and describes Feeding America as a “nationwide network of 200 food banks that leads the fight against hunger in the United States” that “provide[s] food to more than 46 million people through 60,000

1 food pantries and meal programs in communities across America.” Fisher Decl. ¶ 2.
 2 Feeding America also “supports programs that improve food security among the
 3 people [it] serve[s]; educates the public about the problem of hunger; and advocates
 4 for legislation that protects people from going hungry.” *Id.*

5 Initially, Feeding America was already approved as an appropriate *cy pres*
 6 recipient by Judge Beth Labson Freeman in the matter captioned *Ehder Soto v. Wild*
 7 *Planet Foods, Inc.*, 5:15-cv-05082 (N.D. Cal. Dec. 5, 2018). *See* Fisher Decl. Ex. 1
 8 (*Soto* order regarding *cy pres* funds). Similar to the present matter, the *Soto* case
 9 concerned allegations that 5-ounce cans of Wild Planet-brand canned tuna were
 10 underfilled. *See* Fisher Decl. Ex. 2 (*Soto* complaint). Accordingly, Judge Freeman
 11 concluded that a nationwide network of food banks was appropriate to receive *cy pres*
 12 funds.

13 As with the *Soto* matter, the Feeding America network of food banks is an
 14 appropriate *cy pres* recipient because this case concerns similar allegations that
 15 Defendants’ 5-ounce canned tuna is underfilled. *See* Second Amended Complaint, ¶
 16 30 (“Trader Joe’s Tuna is underfilled and thus substantially underweight [and] does
 17 not contain an adequate amount of tuna for a 5-ounce can”) (Dkt. 55).¹ Thus, the
 18 parties’ proposed selection “account[s] for the nature of the plaintiffs’ lawsuit” and
 19 “the objectives of the underlying statutes.” *Nachshin*, 663 F.3d at 1036. The Plaintiff
 20 in this matter is not complaining that her canned tuna is somehow undesirable or
 21 defective – rather, Plaintiff alleges that she *did not receive enough tuna*. *See* Second
 22 Amended Complaint, ¶ 1. Likewise, Plaintiff and the class seek to recover for the
 23 amount their cans were allegedly underfilled. *See id.* ¶ 31 (“Plaintiffs and Class
 24 members have been injured and harmed because ... they paid a price premium for
 25 Trader Joe’s Tuna due to Defendants’ promises that it contained an adequate amount
 26 of tuna for a 5-ounce can.”). Given these allegations, a *cy pres* recipient such as a

27
 28 ¹ Defendants deny these allegations.

1 food bank – whose mission is to provide food to underserved communities – is an apt
 2 match to the nature of the factual and legal claims asserted. For these same reasons,
 3 the selection of Feeding America is also in “the interests of the silent class members,
 4 including their geographic diversity.” Given that the proposed settlement class is
 5 nationwide, a nationwide network of food banks like Feeding America best represents
 6 the interests of the silent class members. *Nachshin*, 663 F.3d at 1036.

7 The Court should grant preliminary approval to the proposed settlement, and
 8 should approve the parties’ choice of Feeding America as the proposed *cy pres*
 9 recipient.

10
 11 Dated: October 4, 2019

Respectfully submitted,

BURSOR & FISHER, P.A.

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